Team 37

No. 14-1248

IN THE
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

FALL TERM 2014

UNITED STATES OF AMERICA,
Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,
Plaintiffs-Intervenors-Appellants

- v. -

MOON MOO FARM, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES
Plaintiffs-Intervenors-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Circuit Court Opinions

District Court Opinions

Rules

Statutes

Regulations

Other Authority

JURISDICTIONAL STATEMENT

Plaintiff, United States (on behalf of the United States Environmental Protection Agency) (collectively referred to as EPA) filed a complaint in the United States District Court for the District of New Union under the jurisdiction of the civil enforcement action provision of the Clean Water Act (CWA), 33 U.S.C. § 1319(b). Under the civil actions provision "[t]he administrator is authorized to commence a civil action for appropriate relief" and may bring the claim "in the district court of the United States for the district in which the defendant is located or resides or is doing business." 33 U.S.C. § 1319(b). Plaintiffs-Intervenors, an environmental organization known as the Deep Quod Riverwatcher, together with its "Riverwatcher," Dean James (collectively, Riverwatcher), intervened as plaintiffs under the jurisdiction of the citizen suit provision of the Clean Water Act § 505(a)(1), 33 U.S.C. § 1365(a)(1). Under the citizen suit provision, "district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." 33 U.S.C. § 1365(a). Pursuant to Rule 13 of the Federal Rules of Civil Procedure, Defendant Moon Moo Farms counterclaimed for common law criminal and civil trespass against Riverwatchers under the laws of the State of New Union. On June 1, 2014, in Order No. 155-CV-2014, the district court granted Moon Moo Farm's motion to dismiss all of Plaintiffs' claims and ruled in favor of Moon Moo Farms on its counterclaim. Plaintiffs filed a timely notice of appeal. Fed. R. App. P. 3-4. The district court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

The district court granted Maleau's motion for summary judgment for each issue now before this Court. The Court reviews a district court's grant of summary judgment and its interpretations of federal statutes *de novo.* Fishermen Against Destruction of Env't, Inc. v.

Closter Farms, Inc., 300 F.3d 1294, 1296 (11th Cir. 2002)alt . Summary judgment is only appropriate where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(a).

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal, a man-made water body, is a public trust navigable water allowing for a public right of navigation.
2. In the alternative, whether evidence obtained through trespass is admissible in a civil enforcement proceeding brought under CWA.
3. Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because
    a. It is a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area; or
    b. If it is not a CAFO, excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability.
4. Whether Moon Moo Farm is subject to a citizen suit under RCRA because
    a. Its land application of fertilizer and soil amendment (a mixture of manure and acid whey) constitutes a solid waste subject to regulation under RCRA Subtitle IV; and
    b. Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B).

STATEMENT OF THE CASE

Statement of Facts

Moon Moo Farm runs a dairy farm with 350 cows located in New Union, where it has its principal place of business. R. at 4. Cow manure and liquid waste is collected through a series

of drains and runs to a lagoon that contains all manure produced by the dairy operation. R. at 4. The stored liquid manure in the lagoon is periodically spread on 150 acres of Bermuda grass fields owned by the Farm. R. at 5. In order to serve the growing demand for milk for Chokos Greek yogurt production, in 2010 the Farm substantially expanded its operation to its current size. Id. The Farm accepts (but does not pay for) acid whey produced by the yogurt plant, which it has added to its manure lagoons and included in the mixture sprayed on its fields. Id.

Moon Moo Farm's expansive property, with its 350 cows, is located on the Deep Quod River (River). Id. A previous owner of the farm excavated a bypass canal in the River, known as the Queechunk Canal (Canal), in order to alleviate flooding. Id. River flow is diverted into the Canal, which is fifty yards wide, three to four feet deep, and is frequently navigated by citizens of Farmville using canoes or small boats. Id. Although Moon Moo Farm has posted the Canal with "No Trespassing" signs, it is commonly used as a shortcut up and down the River. Id. The River, which connects to the Mississippi River, is navigable-in-fact year round, both up and downstream of the Canal. Farmville, downstream of the Farm, uses the River as a main source of drinking water. Id.

Moon Moo Farm has maintained that it does not discharge waste into the River, and it has never obtained a NPDES permit. R. at 5-6. It has however submitted a Nutrient Management Plan (NMP) to the New Union Department of Agriculture (NUDOA), setting forth seasonal manure application rates and expected crop nutrient uptake. R. at 5. The Farm's records show it has applied manure to its fields at rates consistent with its NMP. R. at 6. Although the NUDOA has the authority to reject an NMP, it normally does not review the plans, nor is there any public comment on the submitted plans. R. at 5.

In the early 2013, Riverwatcher, a nonprofit organization, received complaints that the River smelled of manure and was an unusual brown color. R. at 6. In addition, the Farmville Water Authority issued a nitrate advisory for its drinking water. Id. Residents were warned that the municipal water supply was unsafe for babies under the age of two, and that these vulnerable citizens should be given bottled water. Id. The Deep Quod watershed is heavily farmed, thus nitrate advisories have been issued periodically before 2010. R. at 7. Riverwatcher's environmental health expert, Dr. Generis, concluded it was impossible for her to say the manure mixture was the sole cause of the advisory, but Moon Moo Farm's discharges did contribute to the April 2013 nitrate advisory. Id.

In response to local complaints, concerned citizen and Riverwatcher Dean James explored the River in a small boat on April 12, 2013. Id. Within 48 hours before James went up the River, two inches of rain fell, indicating a significant storm event, but not enough to qualify as a 25 year storm (5 inches of rainfall in a 24 hour period). Id. When James passed through the Canal he noted workers for Moon Moo Farm spreading manure mixture over the fields and photographed discolored brown water flowing from the fields through a drainage ditch into the Canal. Id. James took samples of water from the ditch and later tests showed highly elevated levels of nitrates and fecal coliforms. Id.

Riverwatcher's expert witness, Dr. Mae, testified that the lower pH of the liquid manure and acid whey mixture lowered the pH of the soil. Id. According to Dr. Mae, this acidity prevented the Bermuda grass crop from effectively taking up the nutrients in the manure. Id. Furthermore, these unprocessed nutrients were released into the environment and the River, through groundwater leaching and runoff during rain events. Id. Finally, she noted that land application of manure during a rain events is a very poor management practice and will nearly

always result in excess runoff of nutrients. Id. The Farm's expert, Dr. Green, submitted an affidavit that suggests, that land application of whey was a longstanding practice that has been a longstanding tradition in New Union and that Bermuda grass was a crop that tolerates a wide range of soil pH conditions. Id. Dr. Green contends that nothing in the Farm's NMP prevents it from land applying manure during a rain event. Id. However, he agreed with Dr. Mae's analysis that the acid whey reduced soil pH and nitrogen uptake by the Bermuda grass. Id.

Procedural History

This is an appeal brought by Plaintiffs, EPA and Riverwatcher, to dismiss the District Court for the District of New Union's denial for civil penalties and injunctive relief for violations by defendant Moon Moo Farm of the permitting requirements of the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a), 1319(c), (d), 1342. R. at 1. Plaintiffs-Intervenors asserted violation of CWA § 505, and Resource Conservation and Recovery Act (RCRA) § 7002, by Defendant in connection with its manure management practices. Id. Moon Moo Farm counterclaimed for common law trespass, alleging that Riverwatcher illegally entered its property in order to obtain evidence of runoff from its fields. Id. Plaintiffs' filed motions for summary judgment on their CWA and RCRA claims, but were denied. Id. Defendant motions for summary judgment dismissing the CWA and RCRA and trespass counterclaims were all granted. Id.

Following the issuance of the Order of the District Court, Plaintiffs each filed a timely Notice of Appeal. Id. EPA takes issue with the District Court's holdings: that Moon Moo Farm is not a Concentrated Animal Feeding Operation (CAFO) subject to permitting under the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1342; that evidence of the Farm's discharge was obtained by trespass; and that such evidence was not admissible in a civil enforcement proceeding. R. at

1. Riverwatcher join EPA's appeal of each of these issues, and also take issue with the District Court's holdings: that discharges from Defendant's fields fell under the agricultural stormwater exemption of the CWA; the dismissal of Riverwatcher's open dumping and imminent and substantial endangerment claims under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k; and the award of damages against them based on Moon Moo Farm's trespass claim. R. at 1.

SUMMARY OF THE ARGUMENT

Evidence collected on Queechunk Canal is admissible in CWA and RCRA proceedings. The Canal, a man-made water body, is subject to public trust navigation rights known as navigational servitude. The lower court erred by not applying the applicable fact-based test laid out in Kaiser Aetna. The deciding factors are investment backed expectation, historical public use of the canal, and to a lesser extent, historical navigability-in-fact, and Army Corps of Engineer's acquiescence to dredging. Because Moon Moo Farm had little to no investment backed expectations for its use and the Canal has been historically traversed by the public, the Canal is subject to navigational servitude. Moreover, the exclusionary rule does not apply as a *per se* rule in civil proceedings. Instead, the admissibility of evidence collected on private property turns on a balancing test weighing the social benefits of applying the exclusionary rule against the social costs. In this case, the social deterrence benefit of applying the exclusionary rule is not outweighed by the social cost of allowing on-going violations of law to occur.

Moon Moo Farm violated the CWA by discharging manure mixed with acidic byproduct into waters of the United States. The Farm itself constitutes a point source, subject to NPDES permitting requirements, because it is a Concentrated Animal Feeding Operation under EPA regulations. In the alternative, the Farm's land application practices constitute a discharge

because they are channelized through the drainage ditch, an independent point source. Under both of these theories, the Farm's claim that its land application practices are exempt from point source discharge status under a CWA exemption for "agricultural stormwater discharge" fails because its discharge takes place independently of storm events and because its nutrient management practices do not conform to EPA regulatory standards.

Moon Moo Farm is also subject to the RCRA citizen suit provision because its land spreading practices constitute open dumping of solid waste. The Farm does not recycle the manure used in land application in a market or through an industry process, indicating that the land application practice constitutes disposing of solid waste. In the alternative, Moon Moo Farm is subject to RCRA suit because its land spreading practices pose an imminent and substantial endangerment to the citizens of Farmville.

ARGUMENT

I. THE QUEECHUNK CANAL IS A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION, SUBJECT TO PUBLIC RIGHT OF NAVIGATION.

Queechunk Canal is a navigable water of the United States subject to navigational servitude, open to public use. The "commerce clause supports two distinct but often overlapping phenomena: … the congressional authority to regulate the nation's interstate waterways and the federal navigational servitude." Boone v. United States, 944 F.2d 1489, 1492 (9th Cir. 1991). Navigational servitude is "a dominant federal easement which attaches to the [government's ability to] regulate navigable waters in the interest of commerce, and it expresses the notion that the right of public use to a waterway supersedes any claim of private ownership." La. Att'y Gen. Op. No. 96-206 (May 23, 1996). Whether a water is subject to federal navigational servitude is a "mixed question of fact and law;" that is manmade bodies of water are subject to navigational servitude unless a particular pattern of facts can establish otherwise. See Kaiser Aetna v. United

States, 444 U.S. 164 (1979). These facts include, the presence of reasonable investment backed expectations, the lack historical navigability, the Army Corps of Engineers (Corps) acquiescence to the dredging, and commerce activities conducted on the water body. See Id. Although there is no clearly defined test for determining when navigational servitude applies to man-made water bodies, the Supreme Court focuses on the presence of factors such as reasonable investment backed expectations and historical exclusion of public navigation when determining that servitude does not apply. See Kaiser, 444 U.S. 164; Vaughn v. Vermilion Corp., 444 U.S. 206 (1979).

A. The Queechunk Canal, lacking significant investment backed expectations is subject to navigational servitude.

In Kaiser, the Court held that a when an "owner of what was once a private pond, separated from concededly navigable water … has invested substantial amounts of money in making improvements" that pond cannot be subject to federal navigational servitude without being qualified as taking under the Fifth Amendment. Kaiser, 444 U.S. at 176. There, the lessee of a previously non-navigable lagoon, dredged an 8-foot-deep channel connecting the lagoon to the ocean to create a private marina for residents of a subdivision located on its banks. Id. at 167. Once built, the community prohibited commercial uses on the lagoon, thus increasing the property value of the adjacent homes. Id. at 168. The Court, in establishing the factors to be considered where determining the applicability of navigational servitude, gave heavy consideration to the lessee's investment backed expectations of turning the historically non-navigable water into a private marina. Id. at 1502. See also Boone, 944 F.2d 1489 ("treatment of [the water body] as private property and the reasonable investment-backed expectations of the Pond's owners" is significantly weighted in the analysis.)

Using the same fact-based analysis in the case at bar, this court will find the Canal is subject to federal navigational servitude and as such is open to public navigation in that the case at bar is distinguishable from Kaiser. See 444 U.S. 164. First, unlike in Kaiser, where the waterway at issue was "once a private pond, separated from concededly navigable water" where the owner had "invested substantial amounts of money in making improvements" the Canal has never been separated from the River, and the record makes no mention of Moon Moo ever investing substantial amounts of money other than the initial cost of construction to use the canal as a flood bypass. R. at 5; see 444 U.S. at 176. Also, unlike the owner in Kaiser, who dredged an 8-foot-deep channel connecting the lagoon to the Pacific Ocean in order to create a private marina for residents of a subdivision, Defendant's previous owner simply excavated a three to four-foot deep canal for the purpose of floodwater bypass. R. at 5; see 444 U.S. at 167.

Similarly, in Goodman, a Florida District court used the Kaiser factors to hold a spring run in which the owner of adjacent lands had no investment backed expectations, and on which commerce had been regularly conducted, was subject to navigational servitude. Goodman, 669 F.Supp. 394, 401 (M.D. Fla. 1987). For over sixty years residents of the area navigated small boats through the two-foot-deep channel, and used the connecting water body for commercial fishing and recreation. Id. at 395. There, the court in Goodman noted that Kaiser "is an exceptional case involving exceptional circumstances" and is distinguishable. Id. at 400. The court reasoned that "the amount of private money and effort expended for development was substantially less than in Kaiser*"* and further "the Corps of Engineers in no way acquiesced in the unpermitted actions of the [owner] … unlike Kaiser." Id. at 401.

The present case is analogous to the spring run in Goodman. As in Goodman, where there were no investment backed expectations and historical use by the public, the record reflects

no investment expectations from Moon Moo other than initial costs to construct a flood bypass, and the public routinely uses the canal for navigation and recreation. R. at 5; see 669 F. Supp. at 401. Also, like the two-foot-deep channel in Goodman, which has historically been navigated via small boats for fishing and recreation, the Canal is three to four feet deep and has supported navigation and recreation via "canoe or other small boats" since its creation in the 1940's. R. at 5; see 669 F. Supp. at 395. Furthermore, much like the court in Goodman that stated that Kaiser "is an exceptional case involving exceptional circumstances" the court here should also find Kaiser distinguishable. 669 F. Supp. at 400. Also, like the court in Goodman that noted Kaiser was exceptional because "the amount of private money and effort expended for development was substantially less than in Kaiser*"* and the channel is navigable-in-fact, unlike the water in Kaiser, the court here should find the same. See 669 F. Supp. at 401

B. The Queechunk Canal, lacking historical exclusion of private parties is subject to navigational servitude.

Acknowledging its factor-based analysis, the court in Vaughan held that a navigational servitude did not extend to man-made canals being used, and which historically had been used, for private commercial purposes only. 444 U.S. at 209. There, plaintiff Exxon used a series of canals for oil and gas exploration and development activities. Id. at 207. To protect its investments, Exxon hired "people to supervise activities in the canals… and on numerous occasions such people [had] prohibited strangers from entering and using the property." Id. The Court reasoned that, under the principles stated in Kaiser, this man-made canal was not subject to navigational servitude. Id. However, with that being the extent of the Court' analysis, the Court focused specifically on Exxon's historical exclusion of public use. See 444 U.S. 164.

The case at bar can be distinguished from Vaughan in that the fact-based elements the Court used to make its determination of no navigational servitude are absent. 444 U.S. at 209.

Unlike in Vaughan where Exxon created and used canals for oil and gas exploration and development activities, the record reflects no attempt by the Defendant to use the Canal as an exclusive waterway for its own ships; rather it serves only a flood control purposes. R. at 5-6. Additionally, unlike the plaintiff in Vaughan who hired "people to supervise activities in the canals… and … prohibit[ed] strangers from entering and using the property", Defendant has simply put up "No Trespassing" signs while knowing that "the canal is commonly used." Id. The record reflects that canal is indeed navigable-in fact in that "it can be navigated by canoe or other small boat" and was in fact navigated by Dean James in April 2013. R. at 5-6. Further, due to this navigability-in-fact and historical use, it is likely that the canal has been used for commercial purposes. R. at 5.

C. The Queechunk Canal is subject to federal navigation servitude despite the lack of historical navigability in fact or acquiescence by the Army Corps of Engineers.

In addition to the presence of investment backed expectations and historical exclusion of private parties, the Court in Kaiser looked at two, less significant factors to make its ruling. See 444 U.S. 164. The Court mentioned Corps acquaintance and the historical navigability prior to any dredging. See Id. The 9th circuit again considered these factors in Boone, when it held a non-navigable lagoon created with Corps acquiescence was not subject to federal navigation servitude. 944 F.2d at 1502. There, developers purchased the property seeking to turn it into a resort complex. Id. The developers obtained the necessary permits from the Corps, and dredged a channel to public beaches. Id. Eventually, the development plans were abandoned and the property sold to a private trust (Trust). Id. The court reasoned that "like [the pond in Kaiser, this pond] was incapable of use as a continuous highway for the purpose of navigation in interstate commerce" prior to dredging. Id at 1501. However, possibility of prior navigability alone is insufficient to impose navigational servitude as a matter of law and with all other factors

combine, the waterway was not subject to federal navigational servitude. Id. The case at bar can be distinguished from Boone, that noted prior navigability in fact is only one relevant consideration in this analysis and is not determinative. Id. Thus, the court here should take the record's silence on this matter as simply one small factor in its analysis. R. at 5; see 944 F.2d at 1501. To conclude, this court should hold, that the Canal, is a navigable water of the United States subject to navigational servitude, and as such must remain open to public navigation.

II. IN THE ALTERNATIVE, EVIDENCE OBTAINED BY DEAN JAMES IS ADMISSIBLE IN THE CIVIL PROCEEDINGS BROUGHT BY RIVERWATCHERS UNDER THE CLEAN WATER ACT.

Even if Queechunk Canal is not a public waterway, evidence of Moon Moo's CWA and RCRA violations collected by Riverwatchers is admissible in a civil proceeding enforcing those environmental protections. It is long settled that the rule excluding evidence incorrectly obtained is not applicable in criminal proceedings where the evidence is collected by a private person. United States v. Janis, 428 U.S. 433, 455 (1976). Whether this extends to civil proceedings, however, is a matter of weighing the social benefits of applying the exclusionary rule against the social costs. See Janis, 428 U.S. 433; I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984). "On [the] benefit side of the 'prime purpose' of the rule, if not the sole one, is to deter future unlawful police [action]." Lopez-Mendoza, 468 U.S. at 1041. However, it is important to "first identify those who are to be deterred," thus police may not always be the target of deterrence. Janis, 428 U.S. at 448. When looking at the cost side of the analysis, "the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs" are considered. Lopez-Mendoza, 468 U.S. at 1041. If the benefits of applying the exclusionary rule do not outweigh the costs, the exclusionary rule will not be

applied. See Janis, 428 U.S. 433; Lopez-Mendoza, 468 U.S. 1032; Smith Steel Casting Co. v. Brock, 800 F.2d 1329 (5th Cir. 1986).

For example, in Janis, the Court held the "exclusionary rule should not be extended to forbid the use [of evidence] in the civil proceeding of one sovereign … seized by a criminal law enforcement agent of another sovereign." 428 U.S. at 459-60. There, police seized evidence pursuant to a state-issued warrant, which was later quashed. Id. at 435. In a subsequent tax proceeding, the defendant moved to suppress the evidence collected in conjunction with the quashed warrant. Id. at 436-38. The Court found that the exclusionary rule did not apply in civil tax proceedings because the officer had already experienced sanctions and barring evidence here would add little deterrence. Id. at 448-49. The Court noted when conducting this analysis it is critical to distinguish "between those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence … [and cases] where the officer has no responsibility or duty to … the sovereign seeking to use the evidence." Id. at 455. Additionally, the substantial social cost felt by tax evasion, imposed by excluding relevant evidence, did not outweigh "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding." Id. at 453-54.

Similarly, the Court held in Lopez-Mendoza, that the exclusionary rule did not apply in civil deportation proceedings. 468 U.S. at 1042. There, Immigration and Naturalization Services officers illegally arrested the defendant, at which time he admitted to being an illegal alien. Id. at 1035. Subsequently, Lopez-Mendoza moved to dismiss the civil deportation claim against him in that it was the result of his illegal arrest. Id. The Court noted that because the purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws, certain protections afforded in criminal

proceedings do not apply. Id. at 1038. The Court further reasoned that applying the exclusionary rule isn't justified in these proceedings in that it "provides no remedy for completed wrongs." Id. at 1046. Thus, the "application of the rule in INS civil deportation proceedings … 'is unlikely to provide significant, much less substantial, additional deterrence'" benefits. Id. at 1046 (citing Janis, 428 U.S. at 458). Balancing the minimal deterrence with the substantial social costs of applying the exclusionary rule, the Court reasoned its application in "proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law" and that the Court "has never before accepted costs of this character in applying the exclusionary rule." Lopez-Mendoza at 1046.[1]

In the case at bar, this court should hold that the exclusionary rule does not apply in this proceeding and evidence collected by Dean James, during his trip of the River, is admissible. Applying the rule in Janis, this court must "first identify those who are to be deterred." See Janis, 428 U.S. at 448. Here, deterrence relates to private citizens, who obtain evidence by trespass. R. at 6. Although the Court in Janis holds the exclusionary rule should not be extended to forbidding use of evidence by one sovereign obtained by another sovereign, the court here should assume this extends to evidence obtained by private citizens in that this has long been the

[1] Consequently, the fifth circuit held the exclusionary rule applies in OSHA proceedings where the purpose is to punish the employer for past violations, but does not extend to proceedings where the purpose is to correct on-going violations. Smith Steel, 800 F.2d at 1331. In Smith Steel evidence was collected in relation to OSHA violations via an invalid warrant and later the respondent claimed evidence collected pursuant to this warrant was inadmissible in the civil OSHA related proceedings against him. Id at 1332. The court reasoned, based on the holding in Lopez-Mendoza, that "the exclusionary rule should [not] be invoked to prevent the Secretary of Labor from ordering correction of OSHA violations involving unsafe or unhealthy working conditions" but that the rule should be applied "for purposes of 'punishing the crime.'" Id at1334 (Citing Lopez-Mendoza, 468 U.S. 1032).

rule in criminal proceedings and because the Court in Janis noted that police behavior may not always be the target behavior to be deterred. See 428 U.S. at 459-60. Furthermore, like the Court in Janis, which distinguished "between those cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence … [and cases] where the officer has no responsibility or duty to … the sovereign seeking to use the evidence," the court here should find James conducted the search, and as a private citizen he has no "responsibility or duty to" the EPA who is also seeking to use the evidence. Id. at 455.

Additionally, like in Janis, little if any deterrence effect would result from applying the rule because James has already been severely punished for his trespass; he has been found guilty in a court of law and he, along with Riverwaters, have been fined $832,560 for the transgression. R. at 12. Moreover, like the Court in Janis that reasoned the social costs imposed on the people by applying the rule did not outweigh "the additional marginal deterrence," the court here should find the social health costs of drinking "unusually turbid brown color[ed]" water that contains unsafe amounts of nitrates, as well as the poor management practice of applying manure during rain event, in addition to the numerous environmental harms such as reduced soil pH, reduced nutrient uptake by fauna, and the introduction of nitrates into the water via leaching, does not outweigh the marginal deterrence felt by James if the exclusionary rule were applied. R. at 6; Id. at 453-54.

Futhermore, like the civil deportation proceeding in Lopez-Mendoza, where the purpose was not to punish past transgressions but rather to put an end to the continuous violation of law, the purpose of the proceeding here is no to punish Moon Moo for its past violations, but rather to stop its continued violation of law under the CWA and RCRA. R. at 7-12; see 468 U.S. at 1038. Like the Lopez-Mendoza Court which reasoned applying the exclusionary rule would "provide

no remedy for completed wrongs" by the actor, this court should find the same in that applying the rule in this civil proceeding would not provide Moon Moo with an additional remedy for wrongs completed by James. R. at 12; see 468 U.S. at 1046. Thus, like the rule's application in Lopez-Medoza that would be "unlikely to provide significant, much less substantial, additional deterrence" benefits, the rules application here would do the same. See 468 U.S. at 1046 (citing Janis, 428 U.S. at 458). Additionally, like the Court in Lopez-Mendoza that found when balancing the social costs and benefits, the rule's application in proceedings of this kind "would require the courts to close their eyes to ongoing violations of the law" the court here should similarly find the minimal deterrent felt by private actors does not outweigh the exceptional social cost of allowing Moon Moo to continuously break the law noting that the Court "has never before accepted costs of this character in applying the exclusionary rule." See 468 U.S. at 1046.

Consequently, this court should hold photographs and samples of water in the Queechunk Canal obtained by private actor, Dean James, during his investigatory patrol of the Deep Quod River, are admissible evidence, and as such the Fourth Amendment exclusionary rule does not apply in this proceeding.

III. AS A CONCENTRATED ANIMAL FEEDING OPERATION, MOON MOO FARMS HAS VIOLATED THE CLEAN WATER ACT THROUGH ITS UNPERMITTED LAND APPLICATION OF ACIDIC WASTE

The Clean Water Act (CWA) protects the waters of the United States from pollution that is discharged from "point sources" by requiring that they adhere to limitations set out under a permit obtained through the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. §§ 1251-1387. Moon Moo Farm constitutes a Concentrated Animal Feeding Operation (CAFO)—a point source identified in the CWA—as defined by EPA regulation at 40 C.F.R. § 122.23(b)(2-6) and has discharged harmful chemical, biological and suspended solid wastes into

the River without a NPDES permit through its destructive land application of mixed manure and chemical byproduct. 33 U.S.C. § 1362(14).

The Farm argues that its land application practices are exempted from the NPDES permit requirement by a CWA exemption for "agricultural stormwater discharge." Id. However, EPA regulations limit the availability to CAFOs of this agricultural stormwater runoff exception by requiring that they implement nutrient management practices which ensure the land application adequately serves an agricultural purpose. Moon Moo Farm disposed of waste so contaminated with acidic food manufacturing byproduct that it prevented nutrient uptake by the crop in the land application area. Despite the fact that the Farm has filed NMP with the State, its land application practice isn't accordance with any appropriate nutrient management practices, and so cannot relieve the Farm of its statutory obligation to obtain a NPDES permit. R. at 5. See Nat'l Pork Producers Council v. U.S. E.P.A., 635 F.3d 738, 751 (5th Cir. 2011) (affirming "the well-established statutory mandate … that … a discharging CAFO has a duty to apply for a permit").

A. Moon Moo Farm, a Concentrated Animal Feeding Operation, is a point source of water pollution.

The CWA includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, … [or] *concentrated animal feeding operation* … from which pollutants are or may be discharged" in the definition of point source. 33 U.S.C. § 1362(14) (emphasis added). EPA has promulgated regulations which define when an Animal Feeding Operation constitutes a "Large," "Medium," or designated CAFO. 40 C.F.R. § 122.23(b)(2-9). These regulations also require these operations to abide by acceptable agricultural practices, including by requiring adherence to "site specific nutrient management practices" for any land application of "manure, litter or process wastewater." 40 C.F.R. § 122.23(e).

In order to be considered a Medium CAFO, the type and number of animals confined to the facility must fall within an intermediate range (including "200 to 699 mature dairy cows"), and one of the two conditions set forth in section 122.23(b)(6)(ii) of that regulation must apply:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
> (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

Moon Moo Farm houses 350 dairy cows. R. at 4. As established in Parts I and II, *supra*, Riverwatcher has offered evidence that Moon Moo Farm has discharged pollutants into the Canal, and by that into the River, both waters of the United States. R. at 6. By channelizing the runoff liquids from its manure spreading operation into a drainage ditch, Moon Moo Farm brings its operation within subsection (ii)(A) of 122.23(b)(6).[2]

B. Moon Moo Farm's land application practices do not fit the regulatory exemption for agricultural stormwater runoff from CAFOs because they do not ensure appropriate agricultural utilization of nutrients.

Moon Moo Farm argues that it is exempt from its obligation as a CAFO to obtain a NPDES permit by a provision of the Clean Water Act's definition of point source which states that the term "does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The Farm claims that it falls under this exemption

[2] Alternatively, Moon Moo Farm's operation also falls into subsection (ii)(B) of the Medium CAFO provision. As established in Part I, *supra*, the Canal constitutes a water of the United States. Moon Moo Farm is situated in a bend in the River, and the Canal passes straight across its 150 acres of land application area. R. at 5. The definition of "facility" in NPDES regulations includes any "point source," "including land or appurtenances thereto." 40 C.F.R. § 122.2. See Alt v. U.S. E.P.A., 979 F. Supp. 2d 701, 713 (N.D.W. Va. 2013), appeal dismissed (Oct. 2, 2014) (holding that the "farmyard" between confinement houses on a poultry CAFO constitutes part of the facility because the entire CAFO is included under that term). As property under Moon Moo's control to which the Farm applies its manure and wastewater, the land application area is "land" of the CAFO. During the application process, this waste material enters into the Canal both through the drainage ditch and through runoff during rain events. R. at 6.

because it follows a NMP which it has filed with the NUDOA. R. at 5. The EPA has extended this exception to certain land applications on CAFOs which conform to regulatory standards for "site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix)." 40 C.F.R. § 122.23(e).[3] Reuse of these materials as fertilizer, when administered responsibly, is a beneficial agricultural practice, as it can provide useful nutrients for crop production and soil fertility. However, reckless or excessive over-application of nutrient waste which does not conform to the regulations can cause harm throughout the larger watershed.

Moon Moo Farm and the court below misapply Alt v. U.S. E.P.A. for the proposition that any runoff from land outside a CAFO's animal holding and production area falls under the agricultural stormwater exemption, so long as the CAFO follows an NMP in spreading waste onto that land. 979 F. Supp. 2d at 701. In fact, the court in Alt distinguished the waste at issue there, poultry waste which had escaped from chicken holding facilities through ventilation systems, from land applied fertilizer waste as is at issue here. The Alt court held that EPA had already regulated "land application comport[ing] with appropriate site-specific nutrient management practices," but that all *other* runoff from CAFOs were not specifically regulated and required *de novo* analysis. The Alt conclusion is therefore not instructive to the case at bar, which instead can be decided on the terms of the EPA regulations.[4]

[3] The subsequent provision, 40 C.F.R. § 122.23(e)(1), specifies that where the CAFO is a Large CAFO and it does not hold a NPDES permit, adherence to the §122.42(e)(1) standards is the only means for precipitation-related discharge to qualify for the agricultural stormwater exemption. This implies some leeway in interpreting whether a smaller CAFO qualifies for the exemption; nevertheless, the regulations explicitly set the § 122.42(e)(1) standards as the measuring stick to identify whether any CAFO qualifies.

[4] These regulations, as administrative actions with the force of law, constitute an interpretation of the text of the CWA by EPA, an agency congressionally vested with enforcement of the act, and therefore are entitled to Chevron deference. See Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399

The CAFO regulations enunciate three elements for CAFO land application to qualify for the agricultural stormwater discharge exemption. Id. First, the discharge must be the result of a precipitation event. "The discharge … is … subject to NPDES permit requirements, except where it is an agricultural storm water discharge…" 40 C.F.R. § 122.23(e). Second, the land application should be applied "in accordance with site specific nutrient management practices *that ensure appropriate agricultural utilization of the nutrients* in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix)" Id. (emphasis added). Third, the CAFO must maintain records of the NMP and their compliance with the nutrient application rates therein. 40 C.F.R. § 122.42(e)(2). It is undisputed that Moon Moo submitted a NMP with New Union or that they maintained records on site, as required by the third element.

Moon Moo Farm cannot meet the first element of the exception. Riverwatcher does not dispute that the discharge measured by Dean James on April 12, 2013 was present after a storm-one of a magnitude "far short of the 25 year storm." R. at 6. However, as discuss in Section II, *supra*, Moon Moo Farm's discharge of nitrate pollutants into Deep Quod River and Queechunk Canal by the drainage ditch constituted an ongoing activity throughout "late winter and early spring of 2013." Id. Throughout this period, Moon Moo Farm "periodically" applied the collected waste of a dramatically increased milking herd, mixed with byproduct acids from the Chokos facility to the land application area. R. at 5. These ongoing discharges, combined with Mr. James' eyewitness observation, create a "strong circumstantial case" that Moon Moo Farm's discharge is not the exclusive product of storm events. Compare Concerned Area Residents for the Envt. v. Southview Farm, 34 F.3d 114, 117–118 (2d Cir.1994) (Plaintiffs' observation on one date of "liquid manure flowing into and through a swale" combined with evidence that

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F.3d 486, 507 (2d Cir. 2005) (holding that the agricultural stormwater exemption as applied to CAFOs is "self-evidently ambiguous" under Chevron).

Defendants used the same land application practices on that and several other dates created a "strong circumstantial case" for an unpermitted discharge on each date).

Moon Moo Farm also cannot meet the second element of the exception. It argues that by merely submitting an NMP to New Union, it has absolved itself of responsibility for discharges resulting from its land application practices, regardless of whether a storm preceded the discharge or not. R. at 9 (holding that the nitrate waste cannot be a "CAFO discharge" because EPA regulations "specifically exempts as agricultural stormwater landspreading that is performed in accordance with an NMP, as Moon Moo Farm's landspreading was"). This argument overlooks the full text of the regulation, which actually states that a discharge falls under the exemption when it "has been applied in accordance with site specific nutrient management practices *that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix)*" (emphasis added).

The regulations at § 122.42(e)(1) enumerate particular land application standards for the NMP to ensure that the land application constitutes useful fertilization rather than harmful dumping. Although Moon Moo Farm's NMP has not been made available, the record clearly demonstrates Farm conduct well outside these standards. First and foremost, Section 122.42(e)(1)(viii) requires that the CAFO "[e]stablish protocols … that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." In 2010, Moon Moo Farm "substantially increased its milking herd from 170 cows to the current 350 cows;" the record does not indicate that their NMP was in any way modified to accommodate the increase in nitrate pollution and biological contamination contained within the greater volume of cattle waste. R. at 5. In 2012, the Farm began to add acid byproduct from the Chokos facility to its landwaste spread, ostensibly to increase the waste's efficiency as a fertilizer.

This change in practice, which again is not on the record as having been accompanied by a revision of the NMP, instead has completely undermined the fertilizing capacity of the landspread waste. Undisputed testimony from Riverwatcher's expert witness established that the modified mixture increased the acidity of the soil in the land application area, preventing the Bermuda Grass crop there "from effectively taking up the nutrients in the manure." R. at 6. Moon Moo Farm's own expert testified that this acid additive is a common practice in New Union, and even that the Bermuda Grass is generally capable of tolerating a wide range of soil acidity; however, he conceded that *this* acidic additive applied to *this* land application area "reduced nitrogen uptake by the Bermuda Grass." Id. With the soil fertility undermined and the crop on the land application area incapable of accepting the nutrients of the waste, "these unprocessed nutrients were then released to the environment." Id.

This land application practice completely undermines the purpose of the waste as fertilizer. An NMP which permits applications with this composition and at these rates inherently fails to "ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." Moreover, the record reflects failure to meet other provisions of § 122.42(e)(1). Subsection (v) requires that the CAFO "[e]nsure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants" Rather than implement a system "specifically designed" to handle hazardous contaminants generated by the cattle waste, Moon Moo Farm has chosen to dispose of *external* chemical waste from the Chokos facilityto the landspread mixture. Subsection (vi) requires that the CAFO "[i]dentify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of

pollutants to waters of the United States." The record does not indicate any structures controlling runoff from the land application area into Queechunk Canal other than a drainage ditch channelizing this runoff directly into it.

This conduct indicates that Moon Moo Farm's NMP is either woefully out of date after the expansion of the milking herd and the addition of acid byproduct to the landspread waste, or that it never conformed to the standards of § 122.42 in the first place. By failing to meet two of the three elements of the CAFO-agricultural stormwater exception, the Farm remains a point source of water pollution, and has violated the CWA by discharging waste without a permit.

IV. MOON MOO FARM HAS SEPARATELY VIOLATED THE CLEAN WATER ACT BY DISCHARGING ACIDIC WASTE THROUGH THE DRAINAGE DITCH.

Independent of its status as an unpermitted point source under CAFO regulations, Moon Moo Farm is also liable under the CWA for its discharge of acid waste through the drainage ditch, which itself constitutes a point source. The CWA includes "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel … from which pollutants are or may be discharged" in the definition of point source. 33 U.S.C.A. § 1362(14).

The controlling question for whether a conveyance such as a ditch or channel falls under the agricultural stormwater exemption to point source status is whether the discharges through that conveyance "were the result of precipitation." Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 121 (2d Cir. 1994). The fact that a discharge might have eventually mixed with stormwater runoff, or even that the discharge was made *during* a storm event, is not enough to bring it under the exemption. Id. In Southview Farm, witnesses testified that because of excessive land application prior to a storm event, the defendant's fields were "saturated with liquid manure." Id. The fields were later observed discharging into a drain pipe during a storm; however, the discharge was not an "agricultural stormwater discharge" because

the liquid waste had been flooding and pooling independently of the storm. Id. Also in this case, some witnesses testified to observing defendant's vehicles land applying waste during the storm event – that discharge from the vehicles also did not constitute "agricultural stormwater discharge." Contrast Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc., 300 F.3d 1294, 1297 (11th Cir. 2002) (holding that stormwater runoff which had incidentally picked up some manure fertilizer, where the land application practices did not independently discharge the fertilizer, *did* fall under the agricultural stormwater exemption despite the fact that the runoff was channelized into a storm drain).

In this case, evidence on record indicates that Moon Moo Farm's land application practices caused its acid waste to discharge through the drainage ditch into the canal independently of any precipitation event. The Farm engaged for two years in inappropriate application of excessively acidic liquid waste which compromised the capacity of the land application area to absorb nutrients. R. at 5. Mr. James observed this waste seeping off the land application area, through the channel of the drainage ditch, and into the Canal. R. at 6. This was observed *as* Moon Moo Farm vehicles were spreading new waste onto the area, already saturated with rainwater and likely prior waste accumulation. Id. Turbid river water surrounding the Farm throughout the Winter and Spring prior to these observations evince that this sort of discharge was ongoing. Id. The experts' examinations of the Farm's NMP also support that conclusion, as both intimate that Moon Moo Farm made a policy of applying waste before, during, and after rain events. Like the runoff in Southview Farm, Moon Moo Farm's runoff was not caused by a rain event – it was caused by bad practices and oversaturation of the land.

The agricultural stormwater exemption dates from the earliest codification of the CWA, when Congress was distinguishing point sources to be regulated from non-point sources. See

generally Waterkeeper Alliance, 399 F.3d at 491 (2d Cir. 2005) (analyzing the Congressional intent of the exemption in context of CAFOs). Storm runoff was exempted because Congress above all wanted to target large, concentrated and knowing dischargers such as heavy industry, without imposing an unreasonable regulatory burden on individual farmers for essentially natural processes. There is nothing natural about the poor waste application practices of Moon Moo Farm, which is persistently offloading waste into waters of the United States. Its conduct is a poor fit indeed for the exemption.

V. MOON MOO FARM IS SUBJECT TO CITIZEN SUIT UNDER RCRA BECAUSE ITS LAND APPLICATION PRACTICES CONSTITUTE OPEN DUMPING OF SOLID WASTE AND POSE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE CITIZENS OF FARMVILLE

Moon Moo Farm has violated the solid waste provisions of RCRA through its irresponsible land spreading practices. The manure and acid whey mixture constitute a Subtitle D solid waste which, if improperly disposed of, negatively affects health and the environment; the Farm's contravention of Subtitle D regulations exposes it to citizen suit. Moreover, the Farm's land application of this noxious waste has created an imminent and substantial endangerment to the health of the citizens of Farmville. This violation independently creates grounds for citizen suit under RCRA § 7002(a)(1)(B).

A. Moon Moo Farm's Fertilizer and Soil Amendment Constitute a Solid Waste

Moon Moo Farm disposed of solid waste by spreading their manure and acid whey over the Bermuda grass fields. "Solid Waste" is defined by §6903 (27) of the Act as "any garbage, refuse, sludge … including solid, liquid, semisolid, or contained gaseous material resulting from … commercial … agricultural operations, and from community activities." 42 U.S.C. § 6903. The Farm's mixture is a composition of manure and acid whey from yogurt production. R. at 10.

While the record does not indicate whether the mixture is entirely liquid, the language of the act covers not only solids, but extends to liquids and semisolids as well. 42 U.S.C. § 6903.

RCRA regulates the disposal of solid waste. Moon Moo Farm contends that it does not dispose of the waste, but instead recycles it. Disposal is defined as "the discharge, deposit, injection, dumping, spilling, leaking , or placing of any solid waste … into or on any land or water so that such solid waste … may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 USCS § 6903.[5] Regulated materials must be "truly discarded, disposed of, thrown away or abandoned." Safe Air v. Meyer, 373 F.3d 1035, 1040-41 (9th Cir. 2004). Reuse and recyclability is one factor a court considers when determining if a material is has been discarded. Oklahoma v. Tyson Foods, Inc., 2010 WL 653032 at 9 (N.D. Okla. Feb. 17, 2010). Reuse and recycling also depends on the nature of the industry and the general practice of recycling. Am. Mining Cong. v. United States EPA, 824 F.2d 1177, 1180 (D.C. Cir. 1987). "A material [also] constitutes "solid waste,"… *unless* it is directly reused as an ingredient or … effective substitute for a commercial product, or … a raw material substitute to its original manufacturing process." Id. at 1180. Moon Moo Farm discards its manure in the water column. R. at 6. Both experts admit that regardless of the longstanding farming practice of application of the manure, in the magnitudes and proportions employed by the Farm, there is no beneficial effect to the Bermuda grass crops. Id. Consequently, the mixture does not increase the marketability of the crop. Tyson, 2010 WL 653032, at 9. Nor does simply adding acid whey to the manure qualify the mixture to be industry recycling, as the materials are not returning to a refining process for further reuse. Am. Mining Cong., 824 F.2d at 1180.

[5] Mirriam Websters Dictionary defines disposal as "the getting rid of whatever is unwanted or useless." Disposal and discarded can be used as synonyms as applied to this case.

Materials are determined to be solid waste when they have been discarded or disposed of. Safe Air v. Meyer, 373 F.3d 1035, 1040-41 (9th Cir. 2004). Id. In Safe Air, the court held that burning the grass residue from farming did not classify as discarded material because it was not the intent of the farmers to abandon the residue. Id at 1043. Instead, the farmers presented convincing evidence that the grass residue was a critical benefit to the bluegrass fields.

A reviewing court will also determine whether the discarded material had any beneficial use, implying the material was not "discarded" but recycled. Oklahoma v. Tyson Foods, Inc., 2010 WL 653032, at 9 (N.D. Okla. Feb. 17, 2010). In Tyson, the court held that poultry litter was not considered "solid waste" because the State failed to show that the litter had been discarded but had been recycled for agricultural use. The standard the court used was whether the material had market value, and the intent of the party to either discard or put the material to beneficial use. In that case that a vast group of farmers value poultry litter and pay a market value for it. The defendants in that case showed the poultry litter was used as bedding for pens, fertilizer, and other agricultural purposes. The court held that the State failed to establish that the land application of poultry litter constituted a discard of solid waste.

EPA's jurisdiction does not extend to items that are recycled in an on-going industry process. Am. Mining Cong. v. United States EPA, 824 F.2d 1177, 1180 (D.C. Cir. 1987) (AMC). In AMC, the court found EPA's final rule on regulation of solid waste exceeded Congress' delegated authority. Id. at 1193. EPA issued a final rule defining solid waste as items that are disposed of, but also items which are materials recycled through industry processes, also known as "secondary materials. Id. at 1180. Petitioners argued that EPA exceeded the scope of its delegated authority "EPA's reuse and recycle rules, as applied to in-process secondary

materials, regulate materials that have not been discarded, and therefore exceed EPA's jurisdiction." Id. The court reasoned that

> RCRA was enacted, as the Congressional objectives and findings make clear, in an effort to help States deal with the ever-increasing problem of solid waste disposal by encouraging the search for and use of alternatives to existing methods of disposal (including recycling) and protecting health and the environment by regulating hazardous wastes. [I]t seems clear that EPA need not regulate "spent" materials that are recycled and reused in an ongoing manufacturing or industrial process. These materials have not yet become part of the waste disposal problem; rather, they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.

Id. at 1080. The AMC court applies Safe Air to exclude agricultural products from classification under solid waste. R. at 11. Safe Air, 373 F.3d at 1040-41. Moreover, the issue hinged on whether the burned residue was "truly discarded, disposed of, thrown away or abandoned." Id. Safe Air is distinguishable here because Moon Moo Farm is actively discarding the manure mixture by letting it run off into the water column, whereas in Safe Air burned grass residue was deemed indispensable because the farmers reused the ashes for other crops. Safe Air, 373 F.3d at 40. Here, Moon Moo Farms is not reusing the manure, it gets applied to the Bermuda grass for fertilizing then spilled into the water canal. R. at 6.

In determining whether a material is discarded, a court will review the beneficial uses or the ability to recycle the material. Tyson, 2010 U.S. Dist. LEXIS 14941 at 41. Unlike in Tyson where the court found that reusability and economic benefits of the chicken litter were enough to determine that the farmers were not dumping, the manure mixture used by Moon Moo is not reusable, and even if minimally so, it does not provide any economic benefit because of its reusability. Id. at 42. Furthermore, where the court in Tyson, found that the farmers were not using the land "simply to rid themselves of [the litter]," there was a market involved in the purchase and sale of the chicken litter. Although Moon Moo Farm contends that it uses the manure as fertilizer, which constitutes a benefit, both experts for both parties admit that the

manure mixture that is used is not beneficial to the Bermuda grass crops. R. at 4, 6. The Farm's own expert concedes that the acid whey, added to the manure, inhibits the nutrient uptake of the Bermuda grass. R. 6. Dr. Mae's testimony shows the court that the acid whey added to the manure inhibits the uptake of nutrients by the Bermuda grass. Here, the fact that the defendants accepted the acid whey does not indicate a market as in Tyson, 2010 U.S. Dist. LEXIS 14941 at 42. R. 5. Even the long standing practice of accepting the acid whey does not preclude the fact that there is no market exchange, and no benefit to the crops. Id.

Materials reused in an industry process are not determined "solid waste" subject to EPA's regulation under RCRA. Am. Mining Cong. v. United States EPA, 824 F.2d 1177, 1180 (D.C. Cir. 1987) (AMC). In AMC the court found that EPA had exceeded its delegated authority in attempting to regulate secondary industry materials. Id. at 1178. Here, the manure and acid whey are not secondary materials. Once distributed to the Bermuda grass fields, the manure is not returned for further processing. R. at 5. Unlike AMC where the petitioners returned unused hydrocarbons to an appropriate stage in the refining process, for eventual use, the Defendants are storing the manure in a lagoon then distributing it, the manure is not going back into the industrial process through fertilizing or other uses, indicating a disposal subject to RCRA regulation. AMC, 824 F.2d at 1181.

Overall, Riverwatchers can show that the Defendant here is disposing of solid waste, by spreading manure over fields and allowing it to run off into the water canal. Safe Air, 373 F.3d at 1040-41. Furthermore, petitioner can show that the application of manure and acid whey to the fields has no benefit to the growth of the crops as well. Tyson, 2010 U.S. Dist. LEXIS 14941 at 33. Lastly, there is no evidence of the manure and acid whey being recycled or returned for alternative processing, indicating disposal. AMC, 824 F.2d at 1181. These cases help

establish that Moon Moo Farms is disposing of manure and acid whey and is within RCRA's jurisdiction.

A. Moon Moo Farm's land application of the solid waste constitutes open dumping under Section D of RCRA.

Moon Moo Farm is subject to regulation under Section D because it is open dumping of solid waste. Open dumping is "any facility or site where solid waste is disposed of which is not a sanitary landfill" section 6903 (14). A sanitary landfill is defined as "a facility for disposal of solid waste" and a sanitary landfill shall only be classified as such "only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste." Moon Moo is an open dump because the court has knowledge that there is a "reasonable probability of adverse effects on the health…." Here the record is silent on the type of safety equipment involved in containing the manure mixture. Although, the record does state that the manure going into a lagoon "should not" overflow in a normal rainfall year. The record is also silent on the safety measures to ensure that the lagoon does not overflow, the court knows that there are higher nitrate levels in the water, higher fecal coliforms in the water, and the water is brown. R. at 6. Moo Moon farm is subject to regulation under Subsection D of RCRA because it is open dumping.

C. Under RCRA regulation, Moon Moo Farm's manure mixture poses an Imminent and Substantial Endangerment to the citizens of Farmville.

Moon Moo Farm is still subject to suit because Section 6972 (a)(1)(A) of the Resources Conservation and Recovery Act (RCRA) provides that "any person may commence a civil action on his own behalf against any person who is alleged to be in violation of any permit standard regulation, conditions, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C § 6972 (a). RCRA also includes:

> any person … including any past or present generator, post or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility who has contributed or who is contributing to the past or present handing, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

U.S.C section 6972 (a)(1)(B). Congress enacted these broad provisions to help "promote the protection of health and environment …by prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health" 42 U.S.C §6902 (a)(3). To ensure the safety of Farmville's drinking water, Riverwatcher must bring suit to reduce the chances of further contamination.

In order to prevail on a claim of imminent and substantial endangerment, a plaintiff must show that the harm is occurring, or going to occur immediately. Meghrig v. KFC W., 516 U.S. 479, 481, 486 (1996). Although not determinative, a court may examine if there were alternative measures taken to reduce the imminent harm. Davies v. Nat'l Coop. Refinery Ass'n, 963 F. Supp. 990, 999 (D. Kan. 1997). In the case before us, Riverwatcher can show that there is imminent harm that is occurring at this moment. R. at 11. There are nitrate advisories issued to Farmville for its drinking water. Id. Although there are some preventative measure taken, such as giving water bottles to infants, this is not enough. Id.

In order to prevail on a claim plaintiffs must prove that a risk of harm threatens to occur immediately, even though the threat may occur in the future. Meghrig v. KFC W., 516 U.S 479, 481, 486 (1996). In Meghrig, the plaintiffs owned property that was found to have contaminated soil and the city health services ordered a clean-up of the property totaling $211,000. Id. at 481. The plaintiffs, upon removing the contaminated soil, brought suit seeking to recover cleanup costs from the former owners. Id. The Court held that "[the act] permits a private party to bring

suit only… [when] the endangerment is 'imminent' [and] 'threaten[s] to occur immediately.'" Id. at 486. Although the court did note that the "impact of the threat may not be imminent." Id.

A court may accept evidence of alternative measures taken that diminish the threat of imminent harm but mere alternative measures alone does not bar recovery. Davies, 963 F. Supp. 990, 999. In another Kansas case, the court abstained from exercising jurisdiction, and allowed Kansas Health Department to continue its investigation and remediation of the contaminated site. While abstaining the court did consider the threat posed by the ground water contamination. Id at 29. It held that while there was contamination the likelihood that any person will actually be exposed was insignificant. Id. Although the court made it very clear "The court does not mean to suggest that an endangerment to health cannot be considered imminent whenever the plaintiff has a means of avoiding the hazard." Id at 29.

Riverwatcher's claim that the defendant's actions pose an imminent and substantial endangerment must pass because the threat is occurring now and the threat of impact is upon the town. Meghrig v. KFC W., 516 U.S 479, 481, 486 (1996). In Meghrig, the court barred recovery from costs associated with a past contamination clean up from a former owner, whereas here, the threat of harm is occurring now; the nitrate levels of water are rising and infants are requiring bottled water. Meghrig, 516 U.S at 479, R. at 11. Here Meghrig applies because it defines the term "imminence," as used in the statute, which is important in determining if a citizen can bring suit. Id. at 479.

Furthermore, a court may factor in alternative measures taken when determining imminent and substantial endangerment. Davies, 963 F. Supp. 990, 999. While the court here used Davies as their primary case, the court in Davies also noted that proof of alternative measures taken do not bar a citizen from filing suit. Id at 999. In Davies, people were alerted of

the danger and had adequate evacuation routes with alternative sources of drinking water and the court, if it had not abstained in its judgment, noted that alternatives could be considered with determining imminent and substantial endangerment. Id. Here, giving bottled water to babies does present an alternative but, it is not, as the court here implies, a presents a bar to recovery. R. at 11. On the contrary, this is only one factor to consider in determining that there is imminence, and not a complete bar.

Here the trial court abused its discretion in ignoring the courts honored precedent by not even regarding Meghrig. Moreover, the court seeks to apply one case, Davies, which in its opinion states that its discussion was not determinative. 963 F. Supp. at 999. Due to the lower court error this court should determine that there is an imminent and substantial endangerment.

CONCLUSION

We respectfully request this Court to reverse the decision of the court below. The District Court erred not recognizing Queechunk Canal as a water of the United States and in excluding evidence collected by Riverwatcher while lawfully travelling its length. Based on this erroneous exclusion, the court below also dismissed Reiverwatcher's Clean Water Act claim. The CWA claim should stand because Moon Moo Farm has caused an unpermitted discharge, either as a point source under its Concentrated Animal Feeding Operation status or through the point source of its drainage ditch into the Canal. The RCRA claim should stand because the Farm's manure and acid byproduct constitutes a solid waste and because it poses an imminent and substantial danger to the health of Farmville's citizens. This Court should overturn the summary judgment granted below.